Constitutional Law--Criminal Procedure--Right to Effective Assistance of Counsel

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CONSTITUTIONAL LAW—CRIMINAL PROCEDURE—RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.—The Harrison circuit judge appointed the entire Harrison County Bar, with the exception of the prosecutor and one elderly attorney, to defend the indigent Wedding. Mr. J. Thaxter Sims, with three assistants, took charge and conducted the trial. Wedding was tried twice for murder, with the first trial ending in a hung jury and the second in a conviction and the death sentence. The defendant filed a motion to vacate under Ky. R. Cr. 11.42, raising the issue of whether or not he had had the benefit of “effective representation” of counsel as guaranteed by the sixth amendment to the Constitution of the United States and by section 11 of the Kentucky Constitution as interpreted by the Court of Appeals in Rice v. Davis. Held: Reversed. Despite a strong dissent by three judges, the four member majority stated: “In view of the fact that all the available lawyers at the Bar were appointed and, by their own admission, none of them made any reasonable preparation for trial, we conclude that Wedding was denied effective assistance of counsel.”

Wedding v. Commonwealth, 394 S.W.2d 105 (Ky. 1965).

The majority cited only Powell v. Alabama in support of its decision. It erred in viewing the mere fact of the appointment of the entire bar as a decisive factor in Powell; this misinterpretation of Powell led to the erroneous result in Wedding. In Powell the entire bar had been appointed to defend Negroes who were charged with raping white girls. On the morning of the trial, when no one came forward for the defense, a Tennessee lawyer offered to assist although he was unprepared and unfamiliar with Alabama procedure. He was joined by a local attorney, and they went to trial within a few minutes. In holding that the defendants had been denied the right to assistance of counsel in preparing for trial, the Supreme Court in Powell relied less on the appointment of the entire bar than on two other factors: (1) The lack of investigation and preparation between arraignment and trial; (2) The amount of time which lapsed between the actual determination of who was to serve as counsel and the trial itself.

The Supreme Court believed that in the critical period between arraignment and trial “the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid as at the trial itself.” This statement was quoted by the Kentucky

1 366 S.W.2d 153 (Ky. 1963).
2 Wedding v. Commonwealth, 394 S.W.2d 105, 106 (Ky. 1965).
3 287 U.S. 45 (1932).
4 Id. at 57.
Court of Appeals in *Wedding.* The Supreme Court further stated in *Powell* that the duty to assign counsel "is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."

The majority of the Kentucky court failed to see several distinctions between *Powell* and *Wedding* which make the former inadequate as a precedent for the latter. First of all, in *Powell* no one took charge of preparing the defense until a few minutes before trial; but, in *Wedding,* Sims assumed leadership soon after arraignment, which was in ample time to prepare an adequate defense. In addition, there was no testimony that Sims and his assistants lacked time to prepare a defense. Preparation for Wedding's trial was in fact made. An assistant testified that he had been in Sims' office on two or three occasions when Wedding was also present but that the defendant neither made a statement nor aided in his defense. The jailer testified that he took the defendant to Sims' office four or five times for conferences which lasted from two hours and a half to three hours. The testimony of both witnesses went uncontradicted. Obviously attempts were made to prepare a defense for Wedding, whereas in *Powell* an attorney met the defendants only once prior to the day of the trial, and at that time he had not taken personal charge of the defense.

Sims took the course of action which he did due to his personal judgment that, under the circumstances, this was the best way to handle the defense. The prosecution had a very strong case against the defendant. Witnesses testified that Wedding ran his car into the curb, hit the decedent, circled the block, and returned to the scene of the crime. At the same location a witness saw a man carrying another, and decedent's body was found some distance away from where it had been struck. Wedding had the decedent's money on his person when he was arrested, and three witnesses testified that he admitted the crime. In addition, Sims had been told by the circuit judge that no Harrison County jury would give more than a life sentence, and he agreed with this view. One of the assistants testified that he had knowledge of what the witnesses would say, and that no testimony at either trial surprised him. Finally, Wedding seems to have made no objection during the trial.

Considering the efforts of the assigned counsel, *Wedding* represents a major departure in judicial determination of whether or not a defendant has received effective assistance of counsel. The court

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5 394 S.W.2d at 106.
6 287 U.S. at 71.
held that the appointment of the entire bar, coupled with its opinion of the preparation for trial, resulted in ineffective assistance of counsel. The discrepancy between this decision and the usual standard is illustrated by the following statement of the rule in federal courts:

It is generally held that mere mistakes or errors of counsel are not sufficient to establish a violation of the defendant's constitutional right. It is only in such extreme instances where the representation has been so inadequate as to make a farce of the trial that it can be said that the prisoner was deprived of his constitutional rights.7

The Supreme Court sometimes grants relief in this area when it finds abuses of this standard,8 but it usually declines to hear lower court decisions denying relief.9 A recent article pointed out that, in order to warrant a reversal on the grounds of ineffective assistance of counsel, there must be:

[T]he gross errors necessary to meet the test set out by the 'mockery of justice' rule, and it appears that no single act of incompetence, however inexcusable and damaging, can satisfy this test. The cumulative effect of an attorney's errors must be sufficient to render the proceedings a sham. In one sense, the mockery of justice rule is not a standard for determining efficacy or competence, but is rather a criterion for determining whether a defendant has in any meaningful sense, been represented by counsel at all.10

In a leading Kentucky case prior to Wedding on what constitutes effective assistance of counsel the court said:

Allegations of serious mistakes on the part of an attorney, standing alone, even where harm results, are not a ground for habeas corpus. In all the cases decided on the subject, the circumstances surrounding the trial must be such as to shock the conscience of the court and make the proceeding a farce and a mockery of justice.11

This case was cited by the dissent in Wedding.12 Certainly Sims' defense of Wedding more than met any of these established tests of effective representation. He spent substantial time preparing for trial, and his tactics resulted from carefully formulated strategy. This attorney felt that his client had no hope of receiving anything less than a life sentence, and he developed the defense with the

11 Rice v. Davis, 366 S.W.2d 153, 156 (Ky. 1963).
12 394 S.W.2d at 109.
purpose of avoiding the death penalty. The prosecuting attorney testified that he had never heard a better summation than that given by Sims.

In rejecting the *Wedding* approach to effective assistance of counsel the Court of Appeals for the District of Columbia stated:

The result of such an interpretation would be to give any . . . prisoner a hearing after his conviction in order to air his charges against the attorney who formerly represented him. It is well known that the drafting of petitions for habeas corpus has become a game in many penal institutions. Convicts are not subject to the deterrents of prosecution for perjury and contempt of court which affect ordinary litigants. The opportunity to try his former lawyer has its undoubted attraction to a disappointed prisoner. In many cases there is no written transcript and so he has a clear field for the exercise of his imagination. He may realize that his allegations will not be believed but the relief from monotony offered by a hearing in court is well worth the trouble of writing them down. To allow a prisoner to try the issue of the effectiveness of his counsel under a liberal definition of that phrase is to give every convict the privilege of opening a Pandora’s box of accusations which trial courts near large penal institutions would be compelled to hear.13

As Judge Stewart said for himself and two others in a dissent in *Wedding*, “One fair trial is all the law prescribes for any man. Appellant has had his.”14

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**CONSTITUTIONAL LAW—EQUAL PROTECTION IN JURY SELECTION.**—The petitioner, a nineteen-year-old Negro, was indicted for the rape of a seventeen-year-old white girl in Talladega County, Alabama. In this small county twenty-six per cent of the males over twenty-one are Negro, yet no Negro has sat on a petit jury for at least the last twelve years.1 Eight Negroes were selected for the jury venire, two of whom were exempt from service, and the remaining six were excluded by the Alabama jury strike system,2 the petitioner, therefore, upon conviction challenged the constitutionality of the state’s trial

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14 394 S.W.2d at 109.

1 The Supreme Court disagreed as to the period of exclusion. The majority accepted twelve years, 380 U.S. 202, 205, while the dissent accepted testimony that no living person could remember when a Negro sat on the petit jury. 380 U.S. 202, 231.

2 The Alabama jury strike system, which was adopted in 1907, permits each opposing counsel to alternate in striking jurors without cause until twelve remain from the original petit jury venire of one hundred men less those jurors struck for cause. 380 U.S. 202, 210.